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DEC 5 2005

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission  
RAIL SAFETY SECTION

The Department of Transportation of the State of Illinois,  
for and in behalf of the People of the State of Illinois,

Petitioner,

vs.

BNSF Railway Company, f/k/a Burlington Northern  
Santa Fe Railway Company,

Respondent.

Petition for approval of the taking or damaging of certain  
properties in McDonough County, Illinois by exercising  
the right of eminent domain. Parcel No. 409U226TE

T05-0045

Petition for approval of the taking or damaging of certain  
properties in McDonough County, Illinois by exercising  
the right of eminent domain. Parcel Nos. 409U018PE  
and 409U018TE.

T05-0046

Petition for approval of the taking or damaging of certain  
properties in McDonough County, Illinois by exercising  
the right of eminent domain. Parcel No. 409U026PE

T05-0047

Consolidated

**RESPONDENT'S PROPOSED ORDER**

By the Commission:

On August 15, 2005, the Department of Transportation of the State of Illinois ("Petitioner") filed Petitions with the Illinois Commerce Commission ("Commission") naming as Respondent BNSF Railway Company, f/k/a Burlington Northern & Santa Fe Railway Company ("Respondent"), to approve the taking of certain property in McDonough County, Illinois, by exercising the power of eminent domain with respect to Parcel Nos. 409U226TE, 409U018PE, 409U018TE and 409U026PE. The Petitions were assigned Docket Nos. T05-0045, T05-0046 and T05-0047.

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On August 24, 2005, Petitioner filed a Motion for Leave to file an Amended Petition for Approval to Take Property in each docket.

On October 3, 2005, Respondent filed an Answer and Affirmative Defense; on October 20, 2005, Petitioner filed, in each docket, a Motion to Strike Respondent's Affirmative Defense. On November 7, 2005, Respondent filed its Response to Petitioner's Motion to Strike Respondent's Affirmative Defense and Petitioner filed a Reply to that Response on November 11, 2005.

Pursuant to notice as required by law and by the rules and regulations of the Commission, a hearing was held in these dockets on November 20, 2005, before a duly authorized Administrative Law Judge of the Commission at the Commission's offices in Springfield, Illinois. Appearances were entered on behalf of Petitioner, Respondent and by a Staff member of the Railroad Section of the Transportation Division of the Commission ("Staff"). Petitioner's Motion for Leave to Amend, in each docket, was granted without objection. Petitioner's motion to consolidate Dockets T05-0045, T05-0046 and T05-0047 was also granted without objection.

Mr. Joseph Baumann, Condemnation Engineer employed by District 4 of the Illinois Department of Transportation, testified that Petitioner seeks a temporary easement to the property identified as Parcel No. 409U226TE, consisting of two tracts, a permanent easement to the property identified as Parcel No. 409U026TE, a permanent easement to the property identified as Parcel No. 409U018PE and a temporary easement to the property identified as Parcel No. 409U018TE. Mr. Baumann testified that each parcel is needed for a construction project which is a new alignment, a four-lane divided highway with access control that begins just west of Macomb, Illinois, at the intersection with U.S. Route 136, extending southerly and westerly and will eventually connect Macomb to Quincy, Illinois. The proposed FAP Route 315 alignment is for the purpose of assisting the motoring public by eliminating a number of intersections and usage of a divided highway which is a much safer surface for traveling than is usage of side-by-side lanes.

The parcels which are the subject of this proceeding are part of the total project and are located in an approximate 8.13 mile section extending from a proposed interchange southwest of Macomb to a point about a mile west of Tennessee, Illinois.

Mr. Baumann testified that Parcel Nos. 409U018PE and 409U018TE shown on Petitioner's Exhibit No. 5, are located approximately a mile west of Tennessee, Illinois. The proposed realignment of U.S. 136 crosses Respondent's right of way and a

permanent easement is sought at that point to permit construction of two side-by-side highway bridges over Respondent's tracks which will remain at existing grade. U.S. 136 is currently located to the northeast of Parcel No. 409U018PE and is there generally parallel with the Respondent's right of way. Parcel No. 409U018TE is located at a point where the proposed U.S. 136 diverges from the Respondent's right of way, goes west and then reconnects with the proposed new four-lane pavement directly west of Parcel No. 409U018PE. Parcel No. 409U018TE is sought for a period of three years from the date of possession, for primarily purposes of grading and shaping a ditch area between relocated U.S. 136 and the existing railroad tracks. Mr. Baumann further testified that Parcel No. 409U018PE is also needed for future maintenance and any future renewal of the structures to be built.

Mr. Baumann also testified that Parcel Nos. 409U018PE and 409U018TE are subjects of a June 16, 2006 letting schedule but in order for the project to go to letting, the Petitioner needs title to the parcels prior to the advertising of the project for bids as of May 10, 2006. Mr. Baumann additionally testified the construction of the structures at Parcel No. 409U018PE is to be carried out in a manner to permit the Respondent to continue its current operations without interruption. Mr. Baumann testified that the construction contemplated and for which Parcel Nos. 409U018PE and 409U018TE are necessary are part of a five-year plan of proposed highway improvements as depicted in Petitioner's Exhibit No. 14. The construction of which this permanent and temporary easement are sought is programmed as an FY2007 project on a June, 2006 letting.

Mr. Baumann testified that Parcel Nos. 409U226TE and 409U026PE are contained within Petitioner's Exhibit Nos. 3 and 4. Exhibit No. 3 depicts an interchange area immediately south of U.S. Highway 136. The ramps and main line construction of Illinois 336, which generally is a future by-pass around Macomb, Illinois, cross Respondent's existing tracks. The project contemplates construction of three structures under the railroad tracks which will remain at existing grade and are shown on Petitioner's Exhibit No. 4. The structures are identified as Ramp I, which will carry vehicular traffic southerly from Route 136 to 336; Ramp J, which will carry traffic from Route 336 northerly to 136; and, lastly, a two-span structure, located between Ramps I and J, which will allow the four-lane divided highway, U.S. 336, to pass under the railroad tracks. Mr. Baumann testified construction of a shoo-fly, a temporary relocation of the Respondent's rails, is necessary to permit construction of those three structures. Upon completion of construction of the structures, usage of the shoo-fly will terminate and usage of the main track will resume without delay other than removal of the shoo-fly tie-in.

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Mr. Baumann further testified that Parcel No. 409U226TE, tracts 1 and 2, is a temporary easement needed for construction of the shoo-fly and for contractor access.

Mr. Baumann further testified that Parcel Nos. 409U226TE and 409U026PE are on a January, 2006 letting schedule and, assuming that construction of the shoo-fly begins in early 2006, construction should be completed not later than June, 2008. Construction of the shoo-fly will be made by the Petitioner's contractor although shoo-fly tie-ins will be made by the Respondent or by the Respondent's contractor. The specifications for the shoo-fly construction requires the Petitioner's contractor to meet the requirements of the Respondent. Mr. Baumann stated that the only impact of the shoo-fly construction upon the daily operation of the Respondent will be the delays that occur when the actual tie-in of the ends of shoo-fly track to the existing tracks. The Respondent will otherwise be able to continue its existing daily operations throughout the construction of the shoo-fly and of the three structures.

Mr. Baumann testified that funds for the construction of which Parcel Nos. 409U226TE and 409U026PE are required have been appropriated for fiscal year 2006. Mr. Baumann also testified that Petitioner has been unable to acquire the parcels of these consolidated dockets by negotiation and that the projects of which these parcels are part cannot be completed in the absence of acquisition.

Mr. Baumann further testified that all construction taking place, including the grading, the shaping, the ditches, and other associated matters, will be in compliance with the vertical and horizontal clearances under 92 Ill. Adm. Code Part 1500.

On cross examination Mr. Baumann testified that no agreement has been entered into by and between Petitioner and Respondent for the construction of, connection to, or operation over the shoofly by Respondent. Absent such an agreement the project would not be constructed. Mr. Baumann further testified that Respondent owned and operated a one hundred foot right of way through the entire proposed project area. Proposed construction of the two overhead grade separations would result in placement of permanent bridge piers on Respondent's right of way reducing plaintiff's right of way from one hundred to fifty feet. Similarly, construction of the three underpasses as proposed by Petitioner would permanently reduce Respondent's one hundred foot right of way to twenty five feet, effectively permanently restricting Respondent to a single track with no ability to add additional track at any time in the future. Mr. Baumann made no effort to determine Respondent's future track or rail capacity needs.

Thomas Lacy, a Project Engineer employed by Petitioner's District 4, testified that Petitioner's construction plans do not provide sufficient land for the Respondent to conduct its rail operations during construction within the confines of Respondent's own right of way. Mr. Lacy testified that Petitioner had coordinated with Respondent as far as geometrics on the shoo-fly and had obtained approval for those geometrics based on a 79 mile per hour design speed but Respondent has not approved the final plans, the Petitioner and Respondent had not reached agreement on work responsibilities nor indeed, reached any agreement with the Respondent to make the shoo-fly connection at all.

The Commission has reviewed the briefs filed by Petitioner and Respondent on Respondent's Affirmative Defenses and the evidence adduced at the November 2, 2005 hearing. Respondent contends that Illinois laws of eminent domain are preempted in every instance in which the State of Illinois, or one of its departments, attempts to acquire property owned by a railroad through eminent domain. Respondent cites several cases in support of its position. Wisconsin Central, Limited v. City of Marshfield, 160 F.Supp.2d 1009 (USDC W.D. Wis. 2000), federal preemption precluded condemnation sought by the City of Marshfield which would have necessitated the removal of more than 6,800 feet of track which was required for the railroad's operation of its single track line and that taking, if permitted, would have prevented part of the operations of the railroad. Respondent further cites City of Riverview v. Surface Transportation Board 398 F.3d 434 (6<sup>th</sup> Cir. 2005), in which the Court states that state and local governments may not condemn railroad property under the regulatory jurisdiction of the Surface Transportation Board. Petitioner relies on the decision of the Surface Transportation Board in Maumee and Western Railroad Corporation and RMW Ventures, LLC, Finance Docket No. 34-354, decided March, 2004, which held that federal preemption would not result unless the taking of property under State eminent domain laws would prevent or unreasonably interfere with the railroad's operations. The Surface Transportation Board is "uniquely qualified to determine whether state law ... should be preempted." CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp.1573 (USDC, N.D. Ga. Atlanta Div. 1996), citing Medtronic v. Lohr, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

The evidence in this case is that the operation of Respondent's business will be delayed substantially and unreasonably interfered with by virtue of the substantial and permanent reduction in Respondent's usable right of way that will result by petitioner's proposed taking. The Commission believes that the City of Riverside v. Surface Transportation Board, supra serves to reject the Surface Transportation Board's position

as announced in Maumee and Western Railroad, et al., Finance Docket No. 34-354, which position was likely asserted by the Surface Transportation Board before the Sixth Circuit Court of Appeals in City of Riverside. However, to the extent an exception exists to the preemptive effect of 49 U.S.C. §10501, it is Petitioner's burden to prove it falls within the exception it claims exists. Here Petitioner has not met its burden. Petitioner has presented no affirmative evidence other than unsupported assertion, that a permanent 50% to 75% reduction in Respondent's available, usable right of way does not constitute an unreasonable interference with Respondent's rail operation or otherwise constitute impermissible regulation of Respondent's operations.

Through experience, the Commission is aware of the myriad of uses a rail carrier has for its right of way. Not only is the right of way used for the placement of track over which the trains operate, but it is also used for the placement of wayside track signals, communication pole lines, movement of maintenance of way equipment and storage of track materials. These ancillary, yet critical operations uses if its right of way, would be curtailed or completely foreclosed to Respondent if Petitioner's proposed taking were authorized. Moreover, at the three underpass locations, Respondent could only reclaim operational use of the seventy five foot width of its right of way sought to be taken by Petitioner by constructing additional bridges over the proposed highways at substantial cost to respondent. This of course would result in impermissible economic regulation of Respondent. Although Respondent's future or additional needs or uses of its own right of way remains uncertain, the Commission is cognizant of the fact that condemnation is a permanent action, and "it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses." Midland Valley R.R. Co. v. Jarvis, 29 F.2d 539, 541 (8<sup>th</sup> Cir. 1928).

The Commission, after review of the entire record, finds that:

- (1) The Commission has jurisdiction of the subject matter hereof and the parties hereto;
- (2) The recitals set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;
- (3) Petitioner seeks to acquire a temporary easement for a period of three years from the date Petitioner obtains possession of said property or until completion of construction, whichever is earlier, in Parcel No. 409U226TE, consisting of two tracts, and Parcel No. 409U018TE, legally described in

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Appendices "A" and "B", respectively, attached hereto, presently owned of record by Respondent;

- (4) Petitioner seeks to acquire a permanent easement in Parcel No. 409U018PE and Parcel No. 409U026PE, legally described in Appendices "C" and "D", respectively, attached hereto, presently owned of record by Respondent;
- (5) Petitioner seeks to acquire the property interest described above to construct certain roadway improvements;
- (6) Petitioner presented evidence of the ownership by Respondent of the subject property;
- (7) The subject property is railroad operating properly under the jurisdiction of the Surface Transportation Board;
- (8) The evidence shows that the proposed construction cannot be carried out without unreasonably interfering with Respondent's rail carrier operations;
- (9) Taking of the subject property would constitute unreasonable interference with and impermissible regulation of Respondent's right of way and rail operation.

IT IS, THEREFORE, ORDERED that the approval of the Commission be, and it is hereby denied.

IT IS FURTHER ORDERED that Petitioner's Motion to Strike Respondent's Affirmative Defenses is denied as moot.

IT IS FURTHER ORDERED that subject to Sections 18c-2201 and 18c-2206 of the law, this is a final decision, subject to the Administrative Review Law.

By order of the Commission this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

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Chairman

## APPENDIX A

### TRACT ONE

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Beginning at a point on the southerly right-of-way line of Burlington Northern & Santa Fe Railroad, said point being 601.68 feet radially distance westerly from the proposed centerline of FAP Route 315 at station 551+90.07; thence southwesterly along said southerly right-of-way line, 1,857.00 feet to a point being 2,347.56 feet normally distance westerly from said centerline station 545+29.06; thence northwesterly to the northerly right-of-way line of said Railroad, said point being 2,382.11 feet normally distance westerly from said centerline 546+22.81; thence northeasterly along said northerly right-of-way line, 1,857.00 feet to a point being 632.68 feet radially distance westerly from said centerline station 552+93.49; thence 100.00 feet to the Point of Beginning, containing 185,700 square feet, or 4.263 acres, more or less.

### TRACT TWO

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Beginning at a point on the northerly right-of-way line of Burlington Northern & Santa Fe Railroad, said point being 467.70 feet radially distance easterly from the proposed centerline of FAP Route 315 at station 556+21.66; thence northeasterly along said northerly right-of-way line, 1,687.00 feet to a point being 2,105.70 feet radially distance easterly from said centerline station 559+68.64; thence southeasterly to the southerly right-of-way line of said Railroad, said point being 2,128.02 feet radially distance easterly from said centerline 558+92.30; thence southwesterly along said southerly right-of-way line, 1,687.00 feet to a point being 494.50 feet radially distance easterly from said centerline station 555+31.02; thence northerly 100.00 feet to the Point of Beginning, containing 168,700 square feet, or 3.873 acres, more or less.

The said Tracts One and Two contain 354,400 square feet, more or less, or 8.136 acres, more or less.

The said Real Estate being also shown by the plat hereto attached and made a part hereof.

409U226TER1



## APPENDIX B

A part of Lots 3, 4 and 6 in the Northwest Quarter of Section 22, Township 5 North, Range 4 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the Southwest Corner of the Northwest Quarter of said Section 22; thence North 0 degrees 46 minutes 19 seconds East, 305.28 feet to the Northwestern Right-of-Way line of the Burlington Northern and Santa Fe Railroad; thence North 57 degrees 37 minutes 34 seconds East along said Northwestern Right-of-Way Line, 624.59 feet to the Point of Beginning, said point being 135.82 feet normally distant Southerly from the proposed Centerline of Relocated IL Route 136 at Station 25+47.10; thence North 57 degrees 37 minutes 34 seconds East along the northerly right-of-way line of said Burlington and Northern Railroad, 888.26 feet to a point being 60.95 feet normally distant Southerly from said Centerline Station 33+99.01; thence South 32 degrees 22 minutes 30 seconds East, 10.00 feet to a point being 70.95 feet normally distant Southerly from said Centerline Station 33+98.86; thence South 57 degrees 37 minutes 34 seconds West, 888.26 feet to a point being 145.29 feet normally distant Southerly from said Centerline Station 25+50.00; thence North 32 degrees 22 minutes 31 seconds West, 10.00 feet to the Point of Beginning, containing 8,883 square feet, or 0.204 acre, more or less.

It is not the intent of this instrument to encumber any building or structure lying within this easement area.

The said Real Estate being also shown by the plat hereto attached and made a part hereof.

409U018TER1

## APPENDIX C

A part of the Northeast Quarter and Southeast Quarter of Section 21, Township 5 North, Range 4 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the southeast corner of the Northeast Quarter of said Section 21; thence North 0 degrees 46 minutes 19 seconds East along the east line of said Northeast Quarter, 185.84 feet to the southeasterly right-of-way line of the Burlington Northern and Santa Fe Railroad, being the Point of Beginning, said point also being 85.61 normally distant northerly from the proposed centerline of FAP Route 315; thence South 57 degrees 37 minutes 34 seconds West along said southeasterly right-of-way line, 658.73 feet to a point being 285.58 feet normally distant southerly from said centerline; thence North 32 degrees 23 minutes 28 seconds West, 100.00 feet to the said northwesterly right-of-way line of said Burlington Northern and Santa Fe Railroad, said point being 202.98 feet normally distant southerly from said centerline; thence North 57 degrees 37 minutes 34 seconds East on said northwesterly right-of-way line, 724.85 feet to a point being 205.46 feet normally distant northerly from said centerline; thence South 74 degrees 21 minutes 33 seconds East, 134.53 feet to said southeasterly right-of-way line, said point being 173.56 feet normally distant northerly from said Centerline; thence South 57 degrees 37 minutes 34 seconds West along said southeasterly right-of-way line, 156.08 feet to the Point of Beginning, containing 76,984 square feet, or 1.767 acres, more or less.

409U018PER1

#### APPENDIX D

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the southeast corner of the Southeast Quarter of said Section 4; thence North 0 degrees 46 minutes 59 seconds East along the east line of the said Southeast Quarter, 1,355.92 feet to the southerly right-of-way line of the Burlington Northern and Santa Fe Railroad; thence South 72 degrees 32 minutes 14 seconds West along said southerly right-of-way line, 585.39 feet to the Point of Beginning, said point being 494.50 feet normally distant easterly from the proposed centerline of FAP Route 315; thence South 72 degrees 32 minutes 14 seconds West along said southerly right-of-way line, 1,147.01 feet to a point being 601.68 feet normally distant westerly from said centerline; thence North 17 degrees 27 minutes 46 seconds West, 100.00 feet to the northerly right-of-way line of said Burlington Northern and Santa Fe Railroad, said point being 632.68 feet normally distant westerly from said centerline; thence North 72 degrees 32 minutes 14 seconds East along said northerly right-of-way line, 1,147.01 feet to a point being 467.70 feet normally distant easterly from said centerline; thence South 17 degrees 27 minutes 46 seconds East, 100.00 feet to the Point of Beginning, containing 114,701 square feet, or 2.633 acres, more or less.

409U026PER1

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### PROOF OF SERVICE

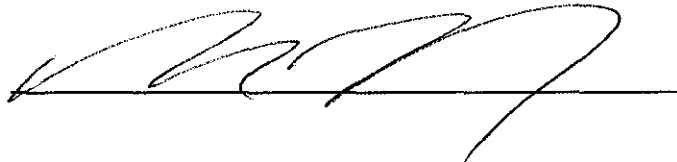
Michael L. Sazdanoff, being first duly sworn on oath, deposes and says that on the 2 day of DECEMBER, 2005, he caused to be served, a true and correct copy of **RESPONDENT'S PROPOSED ORDER** upon:

Mr. Stanley L. Morris  
Special Assistant Attorney General  
205 S. Fifth Street, Suite 900  
Springfield, Illinois 62701

Mr. Henry Humphries  
Railroad Section  
Illinois Commerce Commission  
527 E. Capitol Avenue  
Springfield, IL 62701

Administrative Law Judge Joseph O'Brien  
Illinois Commerce Commission  
527 E. Capitol Avenue  
Springfield, Illinois 62701

by depositing same in the U.S. Mail depository located at Chicago, Illinois in an envelope(s) with first-class postage, prepaid.

A handwritten signature in black ink, appearing to be 'MS', written over a horizontal line.